

# 1992 CASE DIGEST INDEX

## VOLUME 28

*Editor's Note:* The cases in the Index have been classified to conform to the Criminal Law Digest (third edition).

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## PART I—STATE CRIMES

### 1. VALIDITY OF CRIMINAL STATUTES IN GENERAL

#### § 1.15 Severability of statutes

**Florida** Definition of "sexual conduct" applicable to Florida law barring child sexual performances was overbroad, but offending portion was severable from remainder. *Schmitt v. State*, 590 So. 2d 404 (1991), 28 CLB 407.

### 3. NATURE AND ELEMENTS OF SPECIFIC CRIMES

#### § 3.80 Drug violations

**Arkansas** Delivering "counterfeit hashish" was not a crime in Arkansas; therefore, the charge could not validate an arrest warrant that would support search of defendant's premises. *Abbott v. State*, 819 S.W.2d 694 (1991), 28 CLB 407.

#### § 3.85 —Possession

**Kansas** Statute barring possession of controlled substance without affixing tax stamp is constitutional. *State v. Berberich*, 811 P.2d 1192 (1991), 28 CLB 89.

#### § 3.87 Possession with intent to distribute

**Minnesota** Statute making possession of "crack" cocaine more culpable than possession of powder cocaine denies blacks equal protection under Minnesota constitution. *State v. Russell*, 477 N.W.2d 886 (1991), 28 CLB 403.

**New Jersey** Intent to distribute drugs within 1,000 feet of school property is not prerequisite to conviction under statute barring possession of drugs with intent to distribute while on or within 1,000 feet of school property. *State v. Invory*, 124 N.J. 587, 592 A.2d 205 (1991), 28 CLB 181

#### § 3.130 Firearms violations

**New Jersey** New Jersey's forfeiture statute could be applied to motorist's contraband handguns when motorist did not comply with federal Firearms Owners' Protection Act. *In re Two Seized Firearms*, 602 A.2d 728 (1992), 28 CLB 489.

#### 3.160 Fraud

**Arkansas** Defendant cannot be convicted of fraudulent use of credit card if he does not obtain property thereby. *Davidson v. State*, 810 S.W.2d 327 (1991), 28 CLB 90.

#### § 3.195 Vehicular homicide

**California** For purposes of gross vehicular manslaughter, gross negligence can be found from overall circumstances of intoxication alone, without regard to manner of driving. *People v. Bennett*, 819 P.2d 849 (1991), 28 CLB 405.

#### § 3.265 Intoxicated driving

**California** For purposes of gross vehicular manslaughter, gross negligence can be found from overall circumstances of intoxication alone, without regard to manner of driving. *People v. Bennett*, 819 P.2d 849 (Cal. 1991), 28 CLB 405.

**Maine** A person may be convicted as an accomplice to operating under the influence of driving under the influence of alcohol. *State v. Stratton*, 591 A.2d 246 (1991), 28 CLB 92.

#### § 3.270 —Scientific tests

**Arizona** Law enforcement officers, when obtaining a blood sample of a person suspected of driving under the influence of alcohol, need not advise the suspect of his right to obtain a portion of the same sample, even though the warning is necessary for breath samples. *State v. Kemp*, 813 P.2d 315 (1991), 28 CLB 91.

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### § 3.275 Kidnapping

**Tennessee** Kidnapping will not be found where an unlawful confinement, movement, or detention is incidental to accompanying felony and did not increase the risk of harm to the victim. *State v. Anthony*, 817 S.W.2d 299 (1991), 28 CLB 292.

### § 3.320 Obscenity

**Florida** Definition of "sexual conduct" applicable to Florida law barring child sexual performances was overbroad, but offending portion was severable from remainder. *Schmitt v. State*, 590 So. 2d 404 (1991), 28 CLB 407.

### § 3.355 Rape

### § 3.365 —Consent

**Nebraska** Consent or reasonable mistake as to the age of the victim is not a defense to first-degree sexual assault on a child. *State v. Campbell*, 473 N.W.2d 420 (1991), 28 CLB 176.

### § 3.370 Resisting arrest

**Utah** Common-law right to forcibly resist one attempting to effect an illegal arrest is not relevant because in Utah, the common law has been replaced by statute. *State v. Gardiner*, 814 P.2d 568 (1991), 28 CLB 179.

### § 3.375 Robbery

**New Jersey** Purse snatching ordinarily does not involve sufficient force to constitute a

robbery. *State v. Sein*, 590 A.2d 665 (1991), 28 CLB 88.

## 5. PARTIES

### § 5.05 Aiders and abettors

**California** Getaway driver in robbery may be convicted of aiding and abetting robbery, and therefore, of being principal rather than mere accessory after the fact. *People v. Cooper*, 53 Cal. 3d 1158, 282 Cal. Rptr. 450, 811 P.2d 742 (1991), 28 CLB 182.

**Maine** A person may be convicted as an accomplice to operating under the influence of intoxicating liquor. *State v. Stratton*, 591 A.2d 246 (1991), 28 CLB 92.

## 6. DEFENSES

### § 6.20 Entrapment

**Florida** Basing informer's sentence reduction on amount of drugs seized due to information he furnished did not violate defendant's due process rights. *State v. Hunter*, 586 So. 2d 319 (1991), 28 CLB 298.

**Florida** Requiring a defendant to prove the affirmative defense of entrapment beyond a reasonable doubt does not violate the Florida or U.S. Constitution. *Herrera v. State*, 594 So. 2d 275 (1992), 28 CLB 490.

**Michigan** Divided court ruled that subjective factors play a part in objective test for entrapment. *People v. Juillet*, 475 N.W.2d 786 (1991), 28 CLB 292.

## Part II—STATE CRIMINAL PROCEDURES, ANCILLARY PROCEEDINGS

### 7. JURISDICTION AND VENUE

#### § 7.05 Venue

**Indiana** Defendant was not entitled to a change of venue based on newspaper articles

containing factual accounts of the crime and incriminating statements by defendants. *Eads v. State*, 577 N.E.2d 584 (1991), 28 CLB 174.

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### 8. PRELIMINARY PROCEEDINGS

#### § 8.00 Grand Jury Proceedings

**New Jersey** State agency's lack of investigatory resources will not sustain showing of particularized need necessary to gain access to secret grand jury transcripts. In re Grand Jury Testimony, 591 A.2d 614 (1991), 28 CLB 183.

#### § 8.35 Pretrial proceedings

**California** Enactment abolishing defendant's right to postindictment preliminary hearing is valid. *Bowens v. Alameda County Superior Court*, 820 P.2d 600 (1991), 28 CLB 402.

### 9. INDICTMENT AND INFORMATION

#### § 9.05 Probable cause

**California** Law allowing hearsay at preliminary hearings is constitutional, but limits must be placed on the use of such testimony. *Whitman v. Santa Clara County Superior Court*, 820 P.2d 262 (1991), 28 CLB 403.

**Illinois** Juvenile's possession of \$1,000 in cash did not constitute probable cause to believe a crime had been committed. In re D.G., 581 N.E.2d 648 (Ill. 1991), 28 CLB 409.

### 10. PRETRIAL MOTIONS

#### § 10.20 Motions by indigent defendant

**North Carolina** Indigent defendant seeking appointment of a hair, blood, and fingerprint expert must make a preliminary showing that the matter calling for expert testimony will be a significant factor in the trial. *State v. Tucker*, 329 N.C. 709, 407 S.E.2d 805 (1991), 28 CLB 177.

### 11. DISCOVERY

#### § 11.00 In general

#### § 11.25 —Records

**Wisconsin** Common law rule provides that district attorney's files are not open to public

inspection. *State ex rel. Richards v. Foust*, 477 N.W.2d 608 (1991), 28 CLB 402.

### 12. GUILTY PLEAS

#### § 12.15 *Nolo contendere* or *non vult*

**Rhode Island** Recantations of complaining witnesses undermined factual basis of *nolo contendere* plea when recantations were not credible. *Fontaine v. State*, 602 A.2d 521 (1992), 28 CLB 489.

#### § 12.40 Equivocal guilty plea

#### § 12.50 —Court's failure to advise defendant of consequences of plea

**California** When restitution fine is imposed that was not contemplated by the plea bargain, defendant should be allowed to withdraw plea or fine should be reduced to \$100 statutory minimum. *People v. Walker*, 819 P.2d 861 (1991), 28 CLB 406.

### 13. EVIDENCE

#### § 13.05 Presumptions and inferences

**Connecticut** Jury was properly instructed that they could draw unfavorable inference from defense's failure to produce available witness to corroborate defendant's alibi. *State v. Grant*, 602 A.2d 481 (1992), 28 CLB 489.

#### ADMISSIBILITY AND WITNESSES

#### § 13.45 Character and reputation evidence

**Georgia** Mistrial granted when testimony of prosecution witness improperly placed defendant's character in issue. *Whitener v. State*, 261 Ga. 567 407 S.E.2d 735 (1991), 28 CLB 177.

#### § 13.50 Proof of other crimes

**Indiana** Where there is evidence of self-defense, defendant in a homicide case may testify as to victim's prison record. *Russell v. State*, 577 N.E.2d 567 (1991), 28 CLB 174.



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**Montana** Other crimes evidence may be admitted not only to prove a common plan, scheme or system, but also as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *State v. Matt*, 814 P.2d 52 (1991), 28 CLB 85.

**South Dakota** In habitual offender cases, state has initial burden of proving prior valid convictions, but burden then shifts to defendant to show prior convictions are invalid. *Stuck v. Leapley*, 473 N.W.2d 476 28 CLB 175.

### § 13.55 Proof of other bad acts

**West Virginia** In child abuse case, evidence of principal's prior sexual acts are admissible in case against aider and abettor to establish that principal committed the crime. *State v. Lola Mae C.*, 408 S.E.2d 31 (1991), 28 CLB 178.

### § 13.90 Exhibits

**Washington** Charts should not ordinarily be sent to the jury room, but reversible error does not occur unless the defendant was prejudiced thereby. *State v. Lord*, 822 P.2d 177 (1991), 28 CLB 404.

### § 13.95 Opinion evidence

**Kentucky** Testimony of police officer that accused was a "pedophile" was inadmissible, because police officer was not qualified to give such an opinion. *Dyer v. Commonwealth*, 816 S.W.2d 647 (1991), 28 CLB 294.

### § 13.115 Identification evidence

**Colorado** In some cases expert testimony on reliability of eyewitness identification may be proper and trial court has discretion to evaluate such testimony on a case-by-case basis. *Campbell v. People*, 814 P.2d 1 (1991), 28 CLB 183.

### § 13.151 —DNA printing tests

**Arkansas** Novel scientific evidence, such as results of DNA printing tests, are admissible if proponent proves reliability of the scientific evidence and the process underlying the calculations. *Prater v. State*, 820 S.W.2d 429 (1991), 28 CLB 405.

**Iowa** Expert witness can testify as to statistical probability of DNA testing. *State v. Brown*, 470 N.W.2d 30 (1991), 28 CLB 92.

### § 13.170 Privileged communications

**California** Statute abrogating psychotherapist-patient privilege when necessary to warn potential victim of danger, applied where victim was dead and trial was of alleged perpetrator. *People v. Wharton*, 809 P.2d 290 (1991), 28 CLB 93.

### § 13.195 Expert Witnesses

**Colorado** In some cases expert testimony on reliability of eyewitness identification may be proper and trial court has discretion to evaluate such testimony on a case-by-case basis. *Campbell v. People*, 814 P.2d 1 (1991), 28 CLB 183.

**South Carolina** Expert testimony as to the reliability of eyewitness identification evidence is admissible. *State v. Whaley*, 406 S.E.2d 369 (1991), 28 CLB 183.

**Virginia** An expert witness may not give his opinion on the precise or ultimate fact in issue, which must be left to the finder of fact. *Llamera v. Commonwealth*, 414 S.E.2d 597 (1992), 28 CLB 484.

### § 13.230 Cross-examination—right to use witness's prior statements

### § 13.245 —Impeachment by prior conviction

**New Mexico** Prior conviction was admissible to impeach defendant's testimony, even though offense on which conviction was based occurred after offense for which he was being tried. *State v. Trejo*, 825 P.2d 1252 (1992), 28 CLB 486.

### § 13.255 —Impeachment by prior inconsistent statement

**Massachusetts** Prosecution's substantive use in summation of testimony admitted solely to impeach witness justified setting aside of verdict. *Commonwealth v. Rosa*, 587 N.E.2d 767 (1992), 28 CLB 492.

### § 13.265 —Impeachment for bias or motive

**Nevada** Use of accomplice testimony will not be barred merely because prosecutor

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withholds benefit of bargain until after accomplice testifies. *Sheriff, Humboldt County v. Acuna*, 819 P.2d 197 (1991), 28 CLB 292.

### § 13.315 Hearsay evidence

**California** Law allowing hearsay at preliminary hearings is constitutional, but limits must be placed on the use of such testimony. *Whitman v. Santa Clara County Superior Court*, 820 P.2d 262 (1991), 28 CLB 403.

### § 13.317 —Agency exception

**New York** Interpreter, paid to deliver "prosecutable" cases, wasn't mere agent of police; therefore, police testimony as to what interpreter said during drug deal was inadmissible hearsay. *People v. Romero*, 581 N.E.2d 1048 (1991), 28 CLB 409.

### § 13.321 —Videotaped testimony

**Indiana** Statute specifying that a child witness giving videotaped testimony be unable to see or hear defendant violates state constitutional guarantee of face-to-face confrontation with witnesses. *Brady v. State*, 575 N.E.2d 981 (1991), 28 CLB 86.

### § 13.341 —Prior consistent statements as substantive evidence

**Indiana** Indiana Supreme Court limited application of rule that prior out-of-court statements, not under oath, were admissible as substantive evidence. *Modesitt v. State*, 578 N.E.2d 649 (1991), 28 CLB 295.

### § 13.375 —Res gestae and spontaneous declarations

**Washington** Excited utterance, to qualify as hearsay exception, must have been made while the declarant was under stress of excitement. *State v. Chapin*, 826 P.2d 194 (1992), 28 CLB 487.

## WEIGHT AND SUFFICIENCY

### § 13.437 Shoeprint evidence

**Illinois** Shoeprint evidence, standing alone, is sufficient to convict. *People v. Campbell*, 586 N.E.2d 1261 (1992), 28 CLB 490.

## 14. TRIAL

### § 14.20 Qualifications of prosecutor

### § 14.25 —Disqualification of prosecutor

**Arkansas** Prosecuting attorney was not disqualified from prosecuting defendant merely because he had assisted defendant earlier in preparing an affidavit against the victim. *Chellette v. State*, 824 S.W.2d 389 (1992), 28 CLB 484.

**Mississippi** When the defendant's former defense attorney became assistant district attorney, state had the heavy burden of showing that the accused's confidentiality remained unscathed. *Aldridge v. State*, 583 So. 2d 203 (1991), 28 CLB 182.

### § 14.35 Right to public trial

**Rhode Island** Closure of individual voir dire examination of prospective jurors may have been unconstitutional infringement on the press and public's right of access to criminal proceedings. *Providence Journal Co. v. Superior Court*, 593 A.2d 446 (1991), 28 CLB 87.

### § 14.50 Absence of defendant or counsel

**North Carolina** Defendant's absence from bench conferences between trial judge and opposing counsel did not violate his constitutional right to be present at every stage of proceeding. *State v. Buchanan*, 410 S.E.2d 832 (1991), 28 CLB 403.

### § 14.62 Conduct of defense counsel

**Nevada** Defense counsel could be sanctioned for baseless motion suggesting that prosecutor was seeking death penalty for political reasons. *Young v. Ninth Judicial Circuit Dist. Court*, 818 P.2d 844 (1991), 28 CLB 293.

### § 14.70 Right to waive jury trial

**New Jersey** Defendant does not have constitutional right to waive a jury trial and insist of trial by the court. *State v. Dunne*, 590 A.2d 1144 (1991), 28 CLB 88.

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### § 14.150 Conduct of prosecutor

#### § 14.195 —Defense counsel's "opening the door"

**North Dakota** Allowing prosecutor, in rebuttal to defense summation that defendant was victim of "witch hunt," to say that the state "charges only what we feel we can prove" was not reversible error. *State v. Thill*, 473 N.W.2d 451 (1991), 28 CLB 179.

## 15. JURY

### SELECTION

#### § 15.15 Systematic exclusion of blacks, etc.

**Georgia** Criminal defendant may exercise his peremptory challenges in a racially discriminatory manner. *State v. McCollum*, 261 Ga. 473, 405 S.E.2d 688 (1991), 28 CLB 181.

**North Carolina** Racial discrimination against blacks in selecting a grand jury cannot be overcome by racial discrimination against whites. *State v. Moore*, 494 S.E.2d 845 (1991), 28 CLB 91.

#### § 15.45 Exposure of jurors to prejudicial publicity

**Colorado** Trial court has duty to inquire into possibility of juror exposure to prejudicial publicity mid-trial; three-step procedure to be utilized. *Harper v. People*, 817 P.2d 77 (1991), 28 CLB 296.

#### § 15.50 Sequestering the jury

**Massachusetts** Trial judge had discretion to refuse to sequester the jury at the outset of the trial. *Commonwealth v. Cordle*, 412 Mass 172, 587 N.E.2d 1372 (1991), 28 CLB 485.

**New York** Trial judge did not commit reversible error when he directed a court officer to instruct deliberating jurors that they would be sequestered for the evening and to take them to dinner and a hotel. *People v. Bonaparte*, 574 N.E.2d 1027 (1991), 28 CLB 184.

### INSTRUCTIONS

#### § 15.70 Accomplice testimony

**Nevada** Use of accomplice testimony will not be barred merely because prosecutor withholds benefit of bargain until after accomplice testifies. *Sheriff, Humboldt County v. Acuna*, 819 P.2d 197 (1991), 28 CLB 292.

**New York** Defendant was not entitled to instruction that plea bargain with accomplice in return for his testimony was contrary to law. *People v. Thomasula*, 581 N.E.2d 1340 (1991), 28 CLB 408.

#### § 15.155 Lesser included offenses

**Washington** Court sanctioned use of "unable-to-agree jury instruction" that allows jury to move to lesser offense if unable to agree on greater charge. *State v. Labanowski*, 816 P.2d 26 (1991), 28 CLB 298.

#### § 15.195 Punishment (or disposition following insanity acquittal) of no concern to jury

**Colorado** Jury must be told consequences of verdict of not guilty by reason of impaired mental condition. *Cordova v. People*, 817 P.2d 66 (1991), 28 CLB 295.

### VERDICT

#### § 15.290 General verdicts

#### § 15.295 —Inconsistent verdicts

**Indiana** Verdicts of guilty of murder and not guilty of voluntary manslaughter were not consistent. *Bane v. State*, 587 N.E.2d 97 (1992), 28 CLB 491.

#### § 15.305 Duty of trial judge to poll jury or conduct inquiry into juror misconduct

**Rhode Island** In conducting interview with juror who expressed uncertainty as to verdict, judge should not allow defense counsel to examine juror. *State v. Drowne*, 602 A.2d 540 (1992), 28 CLB 491.

#### § 15.325 Guilty but mentally ill.

**New Mexico** Guilty but mentally ill verdict violates neither the right to due process nor

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equal protection of the laws. *State v. Neely*, 819 P.2d 249 (1991), 28 CLB 296.

### 17. SENTENCING AND PUNISHMENT

#### SENTENCING

##### § 17.30 Right to separate sentence hearing where jury fixed punishment

**Indiana** Defendant was entitled to defense psychologist at penalty phase when statutory mitigating factor was possible extreme mental or emotional disturbance at time of murder. *Castor v. State*, 587 N.E.2d 1282 (1992), 28 CLB 485.

##### § 17.40 Standards for imposing sentence

**California** Photographs of homicide victims while alive were admissible at sentencing phase of trial as evidence of circumstance of the crime, which can be aggravating factor. *People v. Edwards*, 819 P.2d 436 (1991), 28 CLB 404.

#### PUNISHMENT

##### § 17.90 Credit for time spent in custody prior to sentencing

**Nebraska** Under Nebraska law, time spent in jail for failure to appear for sentencing is not credited against the defendant's sentence. *State v. Heckman*, 473 N.W.2d 461 (1991), 28 CLB 175.

##### § 17.101 Imposition of restitution

**California** When restitution fine is imposed that was not contemplated by the plea bargain, defendant should be allowed to withdraw plea or fine should be reduced to \$100 statutory minimum. *People v. Walker*, 819 P.2d 861 (1991), 28 CLB 406.

##### § 17.140 Multiple sentences—right to attach prior conviction

##### § 17.145 —Enhancement

**Washington** Fifth Amendment did not bar testimony at sentencing phase by psychologist who interviewed defendant when defendant was in work-release program stemming

from earlier conviction. *State v. Post*, 826 P.2d 173 (1992), 28 CLB 486.

### 18. APPEAL AND ERROR

#### § 18.25 Right to counsel

#### § 18.35 —Withdrawal of counsel

**Oregon** Appointed counsel representing criminal defendant need not withdraw even though he considers defendant's arguments frivolous or meritless; he may see to it that defendant presents arguments in proper appellate form. *State v. Balfour*, 311 Or. 434, 814 P.2d 1069 (1991), 28 CLB 181.

#### § 18.135 Wrongful conviction

**New York** Defendant could not recover damages under New York's erroneous conviction statute merely because her conviction was reversed and the indictment dismissed in the absence of clear and convincing proof that she did commit the crime. *Reed v. State*, 574 N.E.2d 433 (1991), 28 CLB 92.

### 19. PROBATION, PAROLE, AND PARDON

#### PROBATION

#### § 19.00 Conditions for probation

**Nebraska** Conditions of probation may include weekend incarceration and prohibition against entering bowling alleys. *State v. Salyers*, 480 N.W.2d 143 (1992), 28 CLB 487.

### 20. PRISONER PROCEEDINGS

#### § 20.00 In-prison proceedings

**Arkansas** Statute excluding prison inmates from judicial review of constitutionality of administrative adjudications was unconstitutional. *Clinton v. Bonds*, 816 S.W.2d 169 (1991), 28 CLB 293.

#### § 20.45 Postconviction relief

**Tennessee** Withdrawal of petition for postconviction relief did not constitute waiver of ground for postconviction relief. *Albert v. State*, 813 S.W.2d 426 (1991), 28 CLB 174.

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### 21. ANCILLARY PROCEEDINGS FORFEITURE PROCEEDINGS

§ 21.35 Forfeiture proceedings—in general  
Utah Under Utah law, exigent circum-

stances are required before police officer can seize vehicle without a warrant based on probable cause that it was involved in a drug offense. *Davis v. State*, 813 P.2d 1178 (1991), 28 CLB 91.

## Part III—FEDERAL CRIMES

### 24. NATURE AND ELEMENTS OF SPECIFIC CRIMES

#### § 24.15 Bank-related crimes generally

**Court of Appeals, 2d Cir.** Sale of stolen check supported conviction for "scheme to defraud." *United States v. Stavroulakis*, 952 F.2d 686 (1992), 28 CLB 399.

**Court of Appeals 4th Cir.** Check-kiting scheme was violation of bank fraud statute. *United States v. Celestia*, 945 F.2d 756 (1991), 28 CLB 170.

#### § 24.35 Civil Rights violations

#### § 24.40 —Under color of law

**Court of Appeals, 2d Cir.** Police officer's harassment of female drivers constituted civil rights violation. *United States v. Langer*, 958 F.2d 522 (1992) 28 CLB 481.

#### § 24.45 Conspiracy

**Court of Appeals, 3d Cir.** Continuity requirement under RICO was not met in landowner action against railroad and coal companies. *Hughes v. Consol-Pennsylvania Coal Co.*, 945 F.2d 603 (1991), 28 CLB 169.

**Court of Appeals, 4th Cir.** Evidence that conspiracy began before date charged in indictment was properly admitted. *United States v. Lokey*, 945 F.2d 825 (1991), 28 CLB 171.

#### § 24.65 Drug violations

**U.S. Supreme Court** Statute permitting attorney general to schedule a controlled substance on a temporary basis did not violate non-delegation doctrine. *Touby v. United States*, 111 S. Ct. 1752 (1991), 28 CLB 79.

#### § 24.100 Firearms violations

**Court of Appeals, 1st Cir.** Prior convictions were proper predicates to charge of possession of a firearm by a felon. *United States v. Minnick* 949 F.2d 8 (1991), 28 CLB 290.

**Court of Appeals, 4th Cir.** Conviction for possession of firearm upheld even though gun may have been shared by another person. *United States v. Jones*, 945 F.2d 747 (1991), 28 CLB 170.

#### § 24.105 —Interstate transport

**Court of Appeals, 9th Cir.** Evidence that gun was manufactured in another country was sufficient for an interstate commerce connection. *United States v. Alvarez*, 960 F.2d 830 (1992), 28 CLB 483.

#### § 24.135 Hobbs Act

**U.S. Supreme Court** Quid pro quo was necessary for conviction under Hobbs Act. *McCormick v. United States*, 111 S.Ct. 1807 (1991), 28 CLB 80.

**Court of Appeals, 1st Cir.** Evidence of source of immediate funds in Hobbs Act case not essential. *United States v. Tormos-Vega*, 959 F.2d 1103 (1992), 28 CLB 482.

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### § 24.160 Interstate racketeering

**Court of Appeals, 4th Cir.** Murder-for-hire scheme was not subject to federal prosecution where government manufactured jurisdiction. *United States v. Coates*, 949 F.2d 104 (1991), 28 CLB 288.

### § 24.240 Securities regulation violations

**Court of Appeals, 2d Cir.** Purchases of common stock were insufficient to prove securities fraud. *United States v. Mulheren*, 938 F.2d 364 (1991), 28 CLB 83.

## 25. CAPACITY

### § 25.10 Insanity

### § 25.15 —Burden of proof

**Court of Appeals, 2d Cir.** Fact that petitioner was escapee from mental institution was insufficient grounds for questioning his men-

tal competency. *Rollins v. Leonardo*, 938 F.2d 380 (1991), 28 CLB 84.

## 27. DEFENSES

### § 27.15 Entrapment

**U.S. Supreme Court** Child pornography conviction reversed by reason of entrapment. *Jacobson v. United States*, 112 S.Ct. 1535 (1992), 28 CLB 478.

### § 27.20 Immunity from prosecution

**U.S. Supreme Court** Judge was immune from suit for ordering police officers to use excessive force. *Mireles v. Waco*, 112 S.Ct. 286 (1991), 28 CLB 285.

**U.S. Supreme Court** Federal agents had qualified immunity. *Hunter v. Bryant*, 112 S.Ct. 534 (1991), 28 CLB 285.

**Court of Appeals, 3d Cir.** Prosecutor was entitled only to qualified immunity for making false statement to press and other actions relating to seized business. *Schrob v. Catterson*, 948 F.2d 1402 (1991), 28 CLB 290.

## Part IV—FEDERAL PROCEDURES

## 29. PRELIMINARY PROCEEDINGS

### § 29.00 Grand jury proceedings

**U.S. Supreme Court** Indictment was not dismissable even though government failed to disclose exculpatory evidence to grand jury. *United States v. Williams*, 112 S.Ct. 1735 (1992), 28 CLB 48.

were charged in connection with same crime and it was clear that crime was committed by one of the two of them. *United States v. Zafiro*, 945 F.2d 881 (1991), 28 CLB 171.

**Court of Appeals, 9th Cir.** Denial of motion for severance of charges did not deprive defendant of fair trial. *Featherstone v. Estelle*, 948 F.2d 1497 (1991), 28 CLB 289.

## 31. PRETRIAL MOTIONS

### § 31.00 Sufficiency of indictment

### § 31.10 —Severance

**Court of Appeals, 7th Cir.** Severance denied in drug conspiracy trial. Where defendants

## 32. DISCOVERY

### § 32.00 In general

**Court of Appeals, 5th Cir.** Failure of government to notify defendant of exculpatory evidence was not *Brady* violation where evidence was equally available to defense. Her-



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vera v. Collins, 954 F.2d 1029 (1992), 28 CLB 400.

### 33. GUILTY PLEAS

#### § 33.00 Plea bargaining

**Court of Appeals, 3d Cir.** Media coverage of failed plea agreement did not prejudice defendants. *United States v. Gilsenan*, 949 F.2d 90 (1991), 28 CLB 288.

#### § 33.05 —Right to enforce plea bargain

**Court of Appeals, D.C. Cir.** Government's breach of plea agreement regarding scope of allocution harmless error. *United States v. Pollard*, 959 F.2d 1011 (1992), 28 CLB 482.

#### § 33.15 Accepting plea

#### § 33.30 —Duty to advise of consequences of plea

**Court of Appeals, 4th Cir.** District court was not required to inform defendant that once he pled guilty he could not withdraw plea. *United States v. Lambey*, 949 F.2d 133 (1991), 28 CLB 288.

### 34. EVIDENCE

#### ADMISSIBILITY AND WITNESSES

#### § 34.15 Relevancy and prejudice

**U.S. Supreme Court** Evidence that infant victim suffered from battered-child syndrome was relevant to establishing intent. *Estelle v. McGuire*, 112 S. Ct. 475 (1991), 28 CLB 286.

**Court of Appeals, D.C. Cir.** Conviction upheld where defendant constructively possessed drugs in another's apartment. *United States v. Williams*, 952 F.2d 418 (1991), 28 CLB 398.

#### § 34.60 Circumstantial evidence

#### § 34.65 —Intent

**U.S. Supreme Court** Evidence that infant suffered from battered-child syndrome was

relevant to establishing defendant's intent. *Estelle v. McGuire*, 112 S. Ct. 475 (1991), 28 CLB 396.

#### § 334.170 Cross-examination procedure

#### § 34.200 —Impeachment for prior illegal or immoral acts.

**Court of Appeals, 1st Cir.** Defendant lacked standing to challenge evidence of prior bad acts of a codefendant. *United States v. Isabel*, 945 F.2d 1193 (1991), 28 CLB 171.

#### § 34.220 Hearsay evidence

**Court of Appeals, 9th Cir.** Admission of FBI report of fellow inmate did not require reversal. *United States v. Lewis*, 954 F.2d 1386 (1992), 28 CLB 401.

#### § 34.235 —Declarations of coconspirators

**Court of Appeals, 6th Cir.** Defendant was not given opportunity to fully develop coconspirator's testimony at suppression hearing. *United States v. Taplin*, 954 F.2d 1256 (1992), 28 CLB 401.

**Court of Appeals, 11th Cir.** Admission of statement by nontestifying codefendant was harmless error. *United States v. Hemelryck*, 945 F.2d 1493 (1991), 28 CLB 173.

### 35. THE TRIAL

#### § 35.25 Decisions of defense counsel as binding upon defendant

**Court of Appeals, 11th Cir.** Defendant's right to testify in his own behalf was not waivable by defense counsel. *United States v. Teague*, 953 F.2d 1525 (1992), 28 CLB 401.

#### § 35.50 Conduct of trial judge

#### § 35.70 —Exclusion of evidence

**Court of Appeals, 2d Cir.** Precluding references to prior state trial violated defendants' right to fair trial. *United States v. Giovanelli*, 945 F.2d 479 (1991), 28 CLB 168.

**Court of Appeals, 7th Cir.** Prohibition on defense expert's testimony regarding possi-

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ble editing of tape recording was upheld. *United States v. Welch*, 945 F.2d 1378 (1991), 28 CLB 173.

### § 35.95 Conduct of prosecutor

**Court of Appeals, 7th Cir.** Prosecutor's attacks on credibility of defense counsel did not require reversal. *Pierson v. O'Leary*, 959 F.2d 1385 (1992), 28 CLB 482.

### § 35.100 Discretion to prosecute

#### § 35.110 —Comments made during summation

**Court of Appeals, 1st Cir.** Prosecutor's closing argument asking jurors "to do justice for victim" did not require reversal. *United States v. Quesada-Bonilla*, 952 F.2d 597 (1991), 28 CLB 399.

**Court of Appeals, 1st Cir.** Prosecutor's reference during closing arguments to defendant's silence was harmless. *United States v. Hodge-Balwing*, 952 F.2d 607 (1991), 28 CLB 399.

## 36. THE JURY

### SELECTION

#### § 36.10 Systematic exclusion of minority group members

**U.S. Supreme Court** Prosecutor's explanation for striking two Hispanic-speaking prospective jurors was acceptable. *Hernandez v. New York*, 111 S. Ct. 1859 (1991), 28 CLB 80.

**U.S. Supreme Court** Defendant adequately preserved his objection to the state's use of peremptory challenges. *Trevino v. Texas*, 112 S. Ct. 1547 (1992), 28 CLB 478.

#### § 36.25 Conduct of voir dire

**U.S. Supreme Court** Trial court's refusal to question prospective jurors about news reports was proper. *Mu'min v. Virginia*, 111 S. Ct. 1899 (1991), 28 CLB 83.

**U.S. Supreme Court** Delegation of jury voir dire to magistrate was proper. *Peretz v. United States*, 111 S. Ct. 2661 (1991), 28 CLB 82.

#### § 36.30 Peremptory challenges

**Court of Appeals, 5th Cir.** Peremptory challenges of prospective jurors for deficiencies in educational background was proper. *United States v. Hinojosa*, 958 F.2d 624 (1992), 28 CLB 481.

### INSTRUCTIONS

#### § 36.55 Accomplice testimony

**Court of Appeals, 5th Cir.** Failure to give accomplice instruction was not plain error. *United States v. Arky*, 938 F.2d 579 (1991), 28 CLB 85.

#### § 36.65 Burden of proof

**U.S. Supreme Court** Error in instruction allowing jury to presume malice from use of deadly weapon was fatal. *Yates v. Evatt*, 111 S. Ct. 1884 (1991), 28 CLB 80.

#### § 36.70 Character evidence

**Court of Appeals, 2d Cir.** Defendant was not entitled to instruction that evidence of good character alone would be sufficient to create reasonable doubt of guilt. *United States v. Pujana-Mena*, 949 F.2d 24 (1991), 28 CLB 286.

#### § 36.85 Duty to charge on defendant's theory of defense

**Court of Appeals, 5th Cir.** Jury charge on defendant's "good faith belief" upheld. *United States v. Barnett*, 945 F.2d 1296 (1991), 28 CLB 172.

**Court of Appeals, 5th Cir.** Refusal to give defendant's requested instruction of "threat" was not improper. *United States v. Turner*, 960 F.2d 461 (1992), 28 CLB 483.

#### § 36.155 Charge on issues of law

**U.S. Supreme Court** First-degree murder conviction upheld where jury instructions did not require jury to agree on one of alternative theories. *Schad v. Arizona*, 111 S. Ct. 2491 (1991), 28 CLB 81.

### DELIBERATION

#### § 36.195 Other unauthorized or improper conduct

**Court of Appeals, 5th Cir.** Ex parte communication by trial judge to deadlocked jury



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did not violate due process. *Young v. Herring*, 938 F.2d 543 (1991), 28 CLB 85.

**Court of Appeals, 5th Cir.** Substitution of alternate juror for regular juror after deliberations had started was harmless error. *United States v. Quiroz-Cortez*, 960 F.2d 418 (1992), 28 CLB 483.

### 37. POSTTRIAL MOTIONS

#### § 37.00 Motion for new trial

**Court of Appeals, 2d Cir.** Remand was required to determine whether newly discovered evidence warranted retrial. *United States v. Siddiqi*, 959 F.2d 1167 (1992), 28 CLB 482.

**Court of Appeals, 5th Cir.** Seven-day period for defendant to move for new trial was inflexible. *United States v. Zuniga-Salinas*, 945 F.2d 1302 (1991), 28 CLB 172.

#### § 37.35 Federal habeas corpus

**Court of Appeals, 9th Cir.** Judicial estoppel did not apply to habeas corpus proceeding. *Morris v. State of Cal.*, 945 F.2d 1456 (1991), 28 CLB 173.

#### § 37.50 —Exhaustion of state remedies

**U.S. Supreme Court** Questions of federal law decided by state courts were nonreviewable if decision rests on independent state-court grounds. *Coleman v. Thompson*, 111 S. Ct. 2546 (1991), 28 CLB 82.

#### § 37.55 —Waiver or deliberate bypass

**U.S. Supreme Court** State procedural default barred federal review of *Miranda* claim. *Yist v. Nunnemaker*, 111 S. Ct. 2590 (1991), 28 CLB 82.

**U.S. Supreme Court** Cause-and-prejudice standard was to be applicable to habeas corpus petitioner failure to develop material fact in state court proceedings. *Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715 (1992), 28 CLB 479.

#### § 37.65 —Procedure

**U.S. Supreme Court** Court of appeals not required to consider prisoner's claim for

relief without delay in death case where state failed to file objection to delay. *In re Blodgett*, 112 S. Ct. 674 (1992), 28 CLB 397.

### 38. SENTENCING AND PUNISHMENT

#### SENTENCING

#### § 38.10 Presentence report

**Court of Appeals, 2d Cir.** Defendant was not entitled to presentence reports of accomplice witnesses without showing of compelling need. *United States v. Moore*, 949 F.2d 68 (1991), 28 CLB 287.

**Court of Appeals, 9th Cir.** Trial court was not required to order updated presentence report before denying probation. *United States v. Hardesty*, 958 F.2d 910, (1992) 28 CLB 480.

#### § 38.30 Standards for imposing sentence

**U.S. Supreme Court** Due process was violated where defendant was not given adequate notice that he might be sentenced to death. *Lankford v. Idaho*, 111 S. Ct. 1723 (1991), 28 CLB 78.

**U.S. Supreme Court** Agreement by a defendant to stipulated facts establishing more serious crime than that pleaded to may lead to enhanced sentence. *Braxton v. United States*, 111 S. Ct. 1854 (1991), 28 CLB 80.

**U.S. Supreme Court** Weight of container was properly included in determining weight of drug for sentencing purposes. *Chapman v. United States*, 111 S. Ct. 1919 (1991), 28 CLB 80.

**U.S. Supreme Court** District court may not make upward departure under sentencing guidelines without first notifying parties. *Burns v. United States*, 111 S. Ct. 2182 (1991), 28 CLB 78.

**U.S. Supreme Court** Sentencing guidelines applied to sentences of juveniles. *United States v. R.L.C.*, 112 St. Ct. 1329 (1992), 28 CLB 478.

**Court of Appeals, 1st Cir.** Defendant's diminished mental capacity did not justify downward departure in sentencing guidelines. *United States v. Lanzon*, 938 F.2d 326 (1991), 28 CLB 83.

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**Court of Appeals, 1st Cir.** Possession of loaded handgun did not warrant enhancement of sentence. *United States v. Bell*, 953 F.2d 6 (1992), 28 CLB 400.

**Court of Appeals, 2d Cir.** Downward departure from sentencing guidelines was proper on ground of defendant's extreme vulnerability to physical attack. *United States v. Gonzalez*, 945 F.2d 525 (1991), 28 CLB 169.

**Court of Appeals, 2d Cir.** Amounts that victims potentially may have lost were properly considered in imposing sentence. *United States v. Lohan*, 945 F.2d 1214 (1991), 28 CLB 172.

**Court of Appeals, 2d Cir.** Court's decision not to grant downward departure from sentencing guidelines was unappealable. *United States v. Ritchey*, 949 F.2d 61 (1991), 28 CLB 287.

**Court of Appeals, 2d Cir.** Downward departure in sentencing for cooperation with the prosecution required a motion by the government. *United States v. Aqu*, 949 F.2d 63 (1991), 28 CLB 287.

**Court of Appeals, 3d Cir.** Defendant's denial that he committed robbery was basis for denial of sentence reduction. *United States v. Frierson*, 945 F.2d 650 (1991), 28 CLB 169.

**Court of Appeals, 4th Cir.** Defendant was not eligible for sentence reduction as a "minor" participant merely because there were others who were more culpable. *United States v. Palinkas*, 938 F.2d 456 (1991), 28 CLB 84.

**Court of Appeals, 4th Cir.** Defendant was properly classified as career offender even though one prior offense was a misdemeanor under state law. *United States v. Pinckney*, 938 F.2d 519 (1991), 28 CLB 84.

**Court of Appeals, 6th Cir.** Term "victim" included injured bystanders within meaning of sentencing guidelines. *United States v. Muhammad*, 948 F.2d 1449 (1991), 28 CLB 289.

**Court of Appeals, 10th Cir.** Sentence of defendant on same date for different offenses did not make offenses "related" *United States v. Villarreal*, 960 F.2d 117 (1992), 28 CLB 481.

## PUNISHMENT

### § 38.60 Credit for time spent in custody prior to sentencing

**U.S. Supreme Court** Computation of credit for time served after defendant began to serve sentence was proper. *United States v. Wilson*, 112 S. Ct. 1351 (1992), 28 CLB 479.

**Court of Appeals, 1st Cir.** Defendant was denied sentencing credit for time spent in home confinement. *United States v. Zuckular*, 945 F.2d 423 (1991), 28 CLB 173.

## 39. THE APPEAL

**U.S. Supreme Court** Time to file an appeal runs from date court denies motion for reconsideration. *United States v. Ibarra*, 112 S. Ct. 4 (1991), 28 CLB 285.

**U.S. Supreme Court** Inmate's brief was to be functional equivalent to notice of appeal. *Smith v. Barry*, 112 S. Ct. 678 (1992), 28 CLB 398.

### § 39.35 Scope of appellate review

**U.S. Supreme Court** Dismissal of in forma pauperis complaint was properly reviewed for abuse of discretion. *Denton v. Hernandez*, 112 S. Ct. 1728 (1992), 28 CLB 480.

**Court of Appeals, 1st Cir.** Petitioner alleging incompetent counsel issue on appeal did not have burden at pleading stage of establishing meritorious issue. *United States v. Tajedini*, 945 F.2d 458 (1991), 28 CLB 168.

## 40 PROBATION AND PAROLE

### § 40.25 Revocation of parole

**Court of Appeals, 7th Cir.** Exhaustion of remedies in state court was not necessary in order for prisoner to challenge parole procedures. *Clark v. Thompson*, 960 F.2d 663 (1992), 28 CLB 483.

## 41. PRISONER PROCEEDINGS

### § 41.00 In general

**U.S. Supreme Court** Isolated prison incidents of alleged unconstitutional conduct

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may be referred to magistrate. *McCarthy v. Bronson*, 111 S. Ct. 1737 (1991), 28 CLB 79.

**U.S. Supreme Court** Party seeking modification of consent decree must establish significant change in facts or law. *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992), 28 CLB 398.

### § 41.05 Cruel and unusual treatment

**U.S. Supreme Court** Prisoners were required to show deliberate indifference by prison officials when challenging conditions of confinement. *Wilson v. Seiter*, 111 S. Ct. 2321 (1991), 28 CLB 81.

**U.S. Supreme Court** Prisoner may bring valid suit for cruel and unusual punishment even though prisoner has not suffered serious injury. *Hudson v. McMillian*, 112 S. Ct. 995 (1992), 28 CLB 396.

**U.S. Supreme Court** Deputy sheriff's method of apprehending inmate constituted cruel and unusual punishment. *Miller v. Glanz*, 948 F.2d 1562 (10th Cir. 1991), 28 CLB 289.

### § 41.45 Other actions under Federal Civil Rights Act

#### § 41.50 —Immunity

**U.S. Supreme Court** State prosecutor was absolutely immune for participation in probable cause hearing. *Burns v. Reed*, 111 S. Ct. 1934 (1991), 28 CLB 78.

**U.S. Supreme Court** Agents had qualified immunity for arrests for threatening the president. *Hunter v. Bryant*, 112 S. Ct. 534 (1991), 28 CLB 397.

**Court of Appeals, 5th Cir.** Prosecutor and prosecution witnesses were entitled to absolute immunity for civil rights violations. *Young v. Biggers*, 938 F.2d 565 (1991), 28 CLB 85.

### § 41.55 Medical treatment for prisoners

**Court of Appeals, 1st Cir.** Inadvertent failures to provide medical care did not constitute Eighth Amendment violation. *Des-Rosiers v. Moran*, 949 F.2d 15 (1st Cir. 1991), 28 CLB 290.

### § 41.60 Prison regulations

**Court of Appeals, 2d Cir.** Imposition of keeplock on inmate did not violate civil rights. *Jermosen v. Smith*, 945 F.2d 547 (1991), 28 CLB 169.

## 42. ANCILLARY PROCEEDINGS

### DEPRIVATION OF CIVIL RIGHTS

#### § 42.30 In general

**U.S. Supreme Court** Child welfare act did not authorize Civil Rights Act action. *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), 28 CLB 479.

**Court of Appeals, 1st Cir.** Body cavity search of inmate did not constitute civil rights violation. *Cookish v. Powell*, 945 F.2d 441 (1991), 28 CLB 168.

**Court of Appeals, 5th Cir.** Deputy sheriff was liable under civil rights law for assault on wife's former lover. *United States v. Tarpley*, 945 F.2d 806 (1991), 28 CLB 170.

### EXTRADITION

#### § 42.45 Requirements

**U.S. Supreme Court** Immigration appeals are not subject to attorney fee provisions of equal access to justice act. *Ardestani v. Immigration & Naturalization Serv.*, 112 S. Ct. 515 (1991), 28 CLB 397.

### FORFEITURE

#### § 42.60 In general

**Court of Appeals, 2d Cir.** Amendment to forfeiture complaint to conform to evidence of owner's knowledge after date of arrest was in error. *United States v. Certain Real Property*, 945 F.2d 1252 (1991), 28 CLB 172.

**Court of Appeals, 3d Cir.** District court did not err in dismissing defendant's claim to seized money. *United States v. \$1,322,242.58*, 938 F.2d 433 (1991), 28 CLB 84.

**Court of Appeals, 3d Cir.** Property of hus-

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band and wife was subject to forfeiture even though wife was blameless. *United States v.*

*Parcel of Real Property*, 949 F.2d 73 (1991), 28 CLB 287.

### Part V—CONSTITUTIONAL GUARANTEES

#### 43. ADMISSIONS AND CONFESSIONS

##### GROUND FOR EXCLUSION; GENERALLY

##### § 43.00 Involuntariness and coercion

##### § 43.15 —Trickery

**Montana** Confession was involuntary when defendant, who had been awake for twenty-six hours, was lied to about the evidence against him. *State v. Mayes*, 825 P.2d 1196 (1992), 28 CLB 487.

##### § 43.45 Fruit of an earlier inadmissible statement

**Minnesota** Victim of crime was not precluded from testifying against defendant because her name cropped up during interrogation of defendant in violation of his *Miranda* rights. *State v. Doughty*, 472 N.W.2d 299 (1991), 28 CLB 89.

##### VIOLATIONS OF *MIRANDA* STANDARDS AS GROUNDS FOR EXCLUSION

##### § 43.90 Waiver of *Miranda* rights

##### § 43.105 —Effect of request for counsel

**North Carolina** Defendant was not subject to further police interrogation after making two attempts to contact his lawyer with the statement that his attorney had told him not to talk to anyone without calling him first. *State v. Tucker*, 414 S.E.2d 548 (1992), 28 CLB 485.

#### 44. CONFRONTATION OF WITNESSES

##### § 44.00 In general

**U.S. Supreme Court** Prosecution was not required to produce at trial four-year-old

victim of a sexual assault. *White v. Illinois*, 112 S. Ct. 736 (1992), 28 CLB 398.

**Court of Appeals, 6th Cir.** Right of confrontation applied to sentencing hearings. *United States v. Silverman*, 945 F.2d 1337 (1991), 28 CLB 173.

##### § 44.05 —Interpretations by state courts

**North Carolina** Defendant's absence from bench conferences between trial judge and opposing counsel did not violate his constitutional right to be present at every stage of proceedings. *State v. Buchanan*, 410 S.E.2d 832 (1991), 28 CLB 403.

##### § 44.15 Codefendant's out-of-court statements

##### § 44.20 —Admission subject to limiting instructions

**Michigan** Despite redaction, codefendant's out-of-court statement was not admissible if there was substantial risk that jury would consider it in deciding defendant's guilt. *People v. Banks*, 475 N.W.2d 769 (1991), 28 CLB 299.

##### § 44.30 Opportunity to cross-examine

**U.S. Supreme Court** Preclusion of evidence of defendant's own sexual conduct in rape case did not require reversal. *Michigan v. Lucas*, 111 S. Ct. 1743 (1991), 28 CLB 79.

**Court of Appeals, D.C. Cir.** Error by court in refusing to permit defense counsel to cross-examine police officer was harmless. *United States v. Stock*, 948 F.2d 1299 (1991), 28 CLB 290.

#### 45. RIGHT TO COUNSEL

##### SCOPE AND EXTENT OF RIGHT GENERALLY

##### § 45.15 Absence of counsel during portion of proceedings

**U.S. Supreme Court** Invocation of Sixth Amendment right to counsel did not consti-

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tute invocation of Fifth Amendment right to counsel. *McNeil v. Wisconsin*, 111 S. Ct. 2204 (1991), 28 CLB 78.

### § 45.25 Waiver

### § 45.30 —Right to defend pro se

**Nebraska** A trial court should warn a defendant of the dangers and disadvantages of self-representation, but the warning is not required. *State v. Green*, 470 N.W.2d 736 (1991), 28 CLB 87.

### ADEQUACY AND EFFECTIVENESS OF COUNSEL

### § 45.110 Ineffectiveness

**Court of Appeals, 1st Cir.** Defense counsel's decision to waive closing argument was not ineffective assistance of counsel. *United States v. Natanel*, 938 F.2d 302 (1991), 28 CLB 83.

### § 45.115 —Interpretations by state courts

**Minnesota** Attorney's suspension in the middle of a trial does not necessarily deprive defendant of effective assistance of counsel. *State v. Smith*, 476 N.W.2d 511 (1991), 28 CLB 408.

**North Dakota** If a court of appeals cannot determine from the record whether defendant's trial counsel was ineffective and defendant's conviction is affirmed, defendant can reopen the issue via postconviction proceedings. *State v. Woehlfhoff*, 473 N.E.2d 446 (1991), 28 CLB 176.

### § 45.125 —Incorrect legal advice

**Pennsylvania** The fact that a trial strategy was unsuccessful does not mean that it was unreasonable. *Commonwealth v. Savage*, 602 A.2d 309 (1992), 28 CLB 488.

### § 45.130 —Failure to introduce evidence or make objections

**Court of Appeals, 4th Cir.** Habeas corpus petitioner was entitled to evidentiary hearing on issue relating to ineffective assistance of counsel. *Washington v. Murray*, 952 F.2d 1472 (1991) 28 CLB 399.

**Court of Appeals, 8th Cir.** Failure of attorney to insist upon introduction of polygraph test results was not basis for ineffective assistance-of-counsel claim. *Houston v. Lockhart*, 958 F.2d 826 (1992), 28 CLB 480.

### CONFLICT OF INTEREST

### § 45.145 In general

**California** Court's obligation when presented with possible conflict of interest between defendant and counsel is to give defendant an opportunity to discharge counsel. *People v. Jones*, 811 P.2d 757 (1991), 28 CLB 88.

### RIGHT TO CONFER WITH COUNSEL

### § 45.165 In general

**Court of Appeals, 2d Cir.** District court had power to impose sanctions only for bad faith and dilatory conduct during litigation. *United States v. IBT*, 948 F.2d 1338 (1991), 28 CLB 291.

## 46. CRUEL AND UNUSUAL PUNISHMENT

### § 46.00 In general

**U.S. Supreme Court** Imposition of mandatory life sentence without consideration of mitigating factors did not violate Eighth Amendment. *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991), 28 CLB 82.

### § 46.01 —Interpretations by state courts

**Illinois** Requiring habitual child sex offenders to register with the police did not constitute cruel and unusual punishment. *People v. Adams*, 581 N.E.2d 637 (1991), 28 CLB 410.

### § 46.05 Death penalty

**U.S. Supreme Court** A capital sentencing jury was not barred from considering victim impact evidence. *Payne v. Tennessee*, 111 S. Ct. 2597 (1991), 28 CLB 82.

**U.S. Supreme Court** Stay of execution by cyanide gas vacated. *Gomez v. United States Dist. Court*, 112 S. Ct. 1652 (1992), 28 CLB 478.

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**Court of Appeals, 5th Cir.** Death penalty upheld despite claim of incompetency of counsel. *Sawyer v. Whitley*, 945 F.2d 812 (1991), 28 CLB 171.

**Court of Appeals, 9th Cir.** Defendant was not entitled to hearing on claim that administration of death penalty was discriminatory. *Richmond v. Lewis*, 948 F.2d 1473 (1991), 28 CLB 289.

**California** Photographs of homicide victims while alive were admissible at sentencing phase of trial as evidence of circumstance of the crime, which can be aggravating factor. *People v. Edwards*, 819 P.2d 436 (1991), 28 CLB 404.

### § 46.10 —Statutory requirements

**Colorado** Colorado sentencing statute requiring imposition of the death penalty when aggravating and mitigating factors are equal violated state constitution's ban on cruel and unusual punishment. *People v. Young*, 814 P.2d 834 (1991), 28 CLB 179.

## 47. DOUBLE JEOPARDY

### § 47.00 In general

### § 47.05 —Interpretations by state courts

**New York** Defendant, whose guilty plea was vacated because it was based on misinformation that deliberating jury was about to convict him, had been put in jeopardy and could not be retried. *Randall v. Rothwax*, 583 N.E.2d 924 (1991), 28 CLB 408.

### § 47.20 Mistrials

**Court of Appeals, 8th Cir.** Second trial after defendant was granted motion for retrial did not constitute double jeopardy. *Grubbs v. Delo*, 948 F.2d 1459 (1991), 28 CLB 289.

### § 47.30 Crimes against separate sovereignties

### § 47.35 —Dual sovereignty doctrine

**Court of Appeals, 5th Cir.** Federal case was not "sham prosecution" under double jeopardy clause. *United States v. Moore*, 958 F.2d 646 (1992), 28 CLB 481.

### § 47.40 Implied acquittal

**Illinois** Prosecutor's decision not to seek death penalty did not constitute "acquittal" to bar a subsequent decision to the contrary. *People v. Davis*, 579 N.E.2d 877 (1991), 28 CLB 296.

### § 47.45 Separate and distinct offenses

**Montana** Defendant convicted of possession of drugs on his person and possession of drugs on the premises was not subjected to double jeopardy. *State v. Crowder*, 810 P.2d 299 (1991), 28 CLB 87.

**South Dakota** Concurrent sentences for possession of a controlled substance with intent to distribute and simple possession did not constitute double jeopardy for same offense. *State v. Groves*, 473 N.W.2d 456 (1991), 28 CLB 176.

**Virginia** Defendant could be prosecuted for the felony of attempted murder after being convicted for obstruction of justice stemming from a fight with a police officer. *Martin v. Commonwealth*, 406 S.E.2d 15 (1991), 28 CLB 90.

**West Virginia** Separate punishments may be imposed for separate offenses arising out of a single criminal transaction. *State v. Drennen*, 408 S.E.2d 24 (1991), 28 CLB 177.

### § 47.50 —Same transaction

**U.S. Supreme Court** Double jeopardy clause did not bar prosecution of defendant for either drug conspiracy or substantive charges. *United States v. Felix*, 112 S. Ct. 1377 (1992), 28 CLB 479.

**New Mexico** Separate consecutive sentences for incest and criminal sexual penetration do not violate the double jeopardy prohibitions against multiple punishment. *Swafford v. State*, 810 P.2d 1223 (1991), 28 CLB 89.

## 48. DUE PROCESS

### § 48.00 In general

**U.S. Supreme Court** Guilty verdict was valid even though evidence supporting one objective of conspiracy was inadequate. *Griffin*



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v. United States, 112 S. Ct. 466 (1991), 28 CLB 285.

**Court of Appeals, 6th Cir.** Defendant's rights were not violated by referral of case by state to federal prosecutors. *United States v. Allen*, 954 F.2d 1160 (1992), 28 CLB 400.

### § 48.05 —Drug violations

**Florida** Basing informer's sentence reduction on amount of drugs seized due to information he furnished did not violate defendant's due process rights. *State v. Hunter*, 586 So. 2d 319 (1991), 28 CLB 298.

## 49. EQUAL PROTECTION

### § 49.00 In general

**Minnesota** Statute making possession of "crack" cocaine more culpable than possession of powder cocaine denies blacks equal protection under Minnesota constitution. *State v. Russell*, 477 N.W. 2d 886 (1991), 28 CLB 403.

## 53. FREEDOM OF SPEECH AND EXPRESSION

### § 53.00 In general

**U.S. Supreme Court** New York's "Son of Sam" law violated First Amendment. *Simon & Schuster, Inc. v. Members of the NY State Crime Victims Bd.*, 112 S. Ct. 501 (1991), 28 CLB 286.

## 54. IDENTIFICATION PROCEDURES

### § 54.10 Suggestiveness of identification procedure

**Indiana** Defendant's distinctive jacket did not make lineup overly suggestive when witness testified that he relied on defendant's facial characteristics to identify him. *Stone v. State*, 587 N.E.2d 672 (1992), 28 CLB 491.

## 58. PROHIBITION AGAINST UNLAWFUL SEARCHES AND SEIZURES

### SCOPE AND EXTENT OF RIGHT IN GENERAL

#### § 58.03 Property subject to search

**Mississippi** School administrators' search of student's locker based on student informant's statement that defendant had tried to sell him guns was reasonable search. *S.C. v. State*, 583 So. 2d 188 (1991), 28 CLB 184.

#### § 58.10 Property subject to seizure

#### § 58.15 —Plain view

**West Virginia** The inadvertent discovery of the object seized is not a predicate requirement of a plain-view seizure. *State v. Julius*, 408 S.E.2d 1 (1991), 28 CLB 178.

#### § 58.25 —Exigent circumstances

**Court of Appeals, 4th Cir.** Exigent circumstances were lacking in warrantless search of home of alleged narcotics supplier. *United States v. Campbell*, 945 F.2d 713 (1991), 28 CLB 170.

**Massachusetts** Justification for search for gun did not extend to search of plastic bag found instead of gun. *Commonwealth v. Ferguson*, 410 Mass. 611, 574 N.E.2d 990 (1991), 28 CLB 180.

**Michigan** Police officer's entry of home could be justified by need to assist injured person. *City of Troy v. Ohlinger*, 475 N.W.2d 54 (1991), 28 CLB 299.

#### § 58.30 —Automobile searches

**U.S. Supreme Court** Search of closed container in car was permissible. *Florida v. Jimeno*, 111 S. Ct. 1801 (1991), 28 CLB 79.

**U.S. Supreme Court** Fact that police have probable cause to believe that container in vehicle contains contraband does not justify search of entire vehicle. *California v. Acevedo*, 111 S. Ct. 1982 (1991), 28 CLB 81.

**U.S. Supreme Court** Random bus searches were not per se unconstitutional. *Florida v.*

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Bostick, 111 S. Ct. 2382 (1991), 28 CLB 81.

### § 58.32 —Car passengers

**Louisiana** Officer who stopped vehicle for speeding had a right to order passenger to get out of car and produce identification. *State v. Landry*, 588 So. 2d 345 (1991), 28 CLB 291.

### § 58.35 —Airplane passengers

**Court of Appeals, 4th Cir.** Officer's prolonged and persistent questioning of airport passengers violated Fourth Amendment. *United States v. Wilson*, 953 F.2d 116 (1991), 28 CLB 400.

### § 58.43 —Inventory searches

**Massachusetts** Police inventory search may be made only pursuant to written procedures specifying whether and under what circumstances closed containers, including wallets and handbags, may be searched. *Commonwealth v. Rostad*, 410 Mass. 618, 574 N.E.2d 381 (1991), 28 CLB 180.

**Wisconsin** Police conducting warrantless inventory search of suspect's automobile could play unmarked tape and incriminating evidence on tape was admissible against defendant. *State v. Weber*, 471 N.W.2d 187 (1991), 28 CLB 86.

### § 58.50 Search by private person

**Court of Appeals, 4th Cir.** Presence of police when girlfriend searched closet did not make it a governmental search. *United States v. Kinney*, 953 F.2d 863 (1992), 28 CLB 401.

### § 58.64 Urinalysis

**Massachusetts** Random urinalysis drug testing of police officers without a demonstrated, particularized basis for doing so violates the Massachusetts constitution. *Guiney v. Police Commissioner of Boston*, 582 N.E.2d 523 (1991), 28 CLB 406.

### § 58.65 What constitutes an arrest

**Wisconsin** Detention of a person for a field sobriety test is not an arrest that will justify

a search of his person, but an investigative stop that will justify only a weapons frisk. *State v. Swanson*, 475 N.W.2d 148 (1991), 28 CLB 410.

### BASIS FOR MAKING SEARCH AND/OR SEIZURE

### § 58.75 Search Warrant

### § 58.80 —Sufficiency of underlying affidavit

**Court of Appeals, 5th Cir.** False statements in search warrant affidavit did not require acquittal or new trial. *United States v. Wake*, 948 F.2d 1422 (1991), 28 CLB 288.

**Arkansas** Delivering "counterfeit hashish" was not a crime in Arkansas and therefore, the charge could not validate an arrest warrant that would support search of defendant's premises. *Abbott v. State*, 819 S.W.2d 694 (1991), 28 CLB 407.

**Arkansas** Affidavit containing mere conclusory statements as to need for nighttime search will be insufficient to establish reasonable cause. *Garner v. State*, 820 S.W.2d 446 (1991), 28 CLB 406.

**Massachusetts** Affidavit that recited only that informant previously provided information leading to three arrests was not sufficient to satisfy reliability test. *Commonwealth v. Mejia*, 579 N.E.2d 156 (1991), 28 CLB 294.

### § 58.100 —Necessity of obtaining a warrant

**Court of Appeals, 2d Cir.** "Overnight guest" had Fourth Amendment protection against warrantless search. *United States v. Osorio*, 949 F.2d 38 (1991), 28 CLB 287.

### § 58.132 Canine searches

**Maine** Canine sniff searches of packages of first class mail did not violate the Fourth Amendment. *State v. Phaneuf*, 597 A.2d 55 (1991), 28 CLB 294.

### CONSENT AND WAIVER

### § 58.170 In general

**Louisiana** Defendant who asked the police to investigate a stabbing in her apartment tacitly consented to the search of a closet there. *State v. Brady*, 585 So. 2d 524 (1991), 28 CLB 298.



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### § 58.180 —Voluntariness of consent

**Illinois** Consent to search of yacht was coerced when police told owner they had authority to seize the yacht pending their obtaining a search warrant. *People v. Casazza*, 581 N.E.2d 651 (1991), 28 CLB 291.

### § 58.185 —Third-party consent

**Indiana** Warrantless search is legal if police reasonably believe that third party giving consent to search had authority to do so. *Kennedy v. State*, 578 N.E.2d 633 (1991), 28 CLB 297.

## SUPPRESSION OF EVIDENCE IN GENERAL

### § 58.200 Standing

**Court of Appeals, D.C. Cir.** Fourth Amendment issues were properly raised by government for first time on appeal. *United States v. Caicedo-Llanos*, 960 F.2d 158 (1992), 28 CLB 484.

**Iowa** Criminal defendant lacked standing to suppress evidence obtained in violation of judicial directive not to use probationers as confidential informants. *State v. Garrow*, 480 N.W.2d 256 (1992), 28 CLB 488.

## 59. PROHIBITION AGAINST SELF-INCRIMINATION

### TESTIMONY AND RECORDS

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**Washington** Fifth Amendment did not bar testimony at sentencing phase by psychologist who interviewed defendant when defendant was in work-release program stemming from earlier conviction. *State v. Post*, 826 P.2d 173 (1992), 28 CLB 486.

## 60. RIGHT TO SPEEDY TRIAL

### § 60.06 Length of delay

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